P.R. No. 2352/05
Presented by Shri. [illegible]
dated 30-05-05

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CANCELLED

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT

BILASPUR

W.P.NO. 2227 / 2005 SINGLE BENCH

Petitioner
Plaintiff : Ramkrishn Singh S/o Malikram,
Aged about 41 years, R/o Village – Khapari, Tahsil – Mungeli,
Dist : Bilaspur-(C.G.)

Versus

Respondents
Defendants :1. Devendra singh S/o Malikram
Aged about 47 years, Caste – Bargah (Hindu), Occupation – Service (Teacher) at present R/o Village Salfa, Navagaon, Tahsil – Kota, Dist : Bilaspur – (C.G.)

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30.5.05
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3. Malikram S/o Laxman Singh, Caste – Bargah (Hindu) R/o Village Khupari, Tahsil – Mungeli, Dist : Bilaspur – (C.G.)

4. Ramsharan Singh @ Manharan Singh S/o Malikram, Aged about 42 years, Occupation – Service at present R/o Gadchandul, Manikgarh, Dist : Chandrapur (M.S.)

5. State of Chhattisgarh,
Through The Collector,
Bilaspur-(C.G.)

Note : Respondent no.2 / Defendant no.2 Paraga Bai died during pending of the suit and also deleted the suit of the cause title.

WRIT PETITION UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA

APR

HIGH COURT OF CHHATTISGARH : BILASPUR

WRIT PETITION NO. 2227 OF 2005

RAMKRISHN SINGH

VS.

DEVENDRA SINGH & OTHERS

ORDER

POST FOR ORDER ON 10-11-2006

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH : BILASPUR

Writ Petition No. 2227 of 2005

Petitioner/ Plaintiff	:	**Ramkrishn Singh**
		Vs.
Respondents/ Defendants	:	**Devendra Singh & others**

Petitioner/plaintiff by Shri Bharat Rajput, Advocate.
Respondents/defendants by Shri Prafull Bharat, Advocate.

ORDER
(Passed on 10 /11/06)

DHIRENDRA MISHRA, J

The petitioner by the instant petition under Article 226/227 of the Constitution of India has impugned the order dated 9.5.2005 of Annexure P/13 by which learned II Additional District Judge (FTC), Mungeli (C.G.) has dismissed the miscellaneous civil appeal preferred against the order dated 23.6.2003 of Annexure P/12 passed by Civil Judge, Class-I, Mungeli whereby the application of the petitioner for temporary injunction was dismissed .

2. Facts of the case for the purpose of disposal of this petition may be summarized as under:

The petitioner, respondents Nos. 1 and 4 are sons of respondent No. 3 whereas Smt. Paraga Bai (respondent No. 2, since deceased) was their mother. The petitioner filed a civil suit of Annexure P/1 for declaration with the averment that respondent No. 3 purchased the suit land described in schedule appended with the plaint in the name of their mother Paraga Bai. Respondents No. 1 and 4

were government employees. Since the father and mother of the petitioner were not able to look after the cultivation due to their old age and weakness, they persuaded the petitioner not to join government service and promised him to give a bigger share in the agricultural land and accordingly, 4.18 acres of land was got mutated in the name of the petitioner and wife of respondent No. 4 some 12 years prior to filing of the suit and since then he obtained possession and developed the land by installing irrigation pump. However, behind the back of the petitioner the land described in schedule was mutually partitioned between respondents No. 1 and 4 in connivance with the revenue officers. The partition of the land in favour of respondents No. 1 and 4 is void being contrary to the provisions of Section 178 of Land Revenue Code and rules framed thereunder. However, on the basis of void partition the respondents moved an application under Section 250 of the Land Revenue Code vide Annexure P/6. The Tehsildar, Bilaspur vide order dated 31.5.2003 (Annexure P/14) allowed the application of respondents No. 1 and 4 and held that the petitioner is in illegal possession over the land recorded in the name of respondents No. 1 and 4 and therefore, the possession of the respondents No. 1 and 4 is handed over to them by dispossessing the petitioner.

3. Respondent No. 1 and his mother Paraga Bai in their written statements denied the allegations of the plaint and submitted that in fact Paraga Bai has purchased the disputed land from her own resources and as such it was her self acquired property. The petitioner had got his name recorded over the disputed property in connivance with the revenue authorities. However, mutation in his favour was set aside in appeal. Paraga Bai was residing with respondents No. 1 and 4 and she had transferred her self acquired property in their name

voluntarily, therefore, question of petitioner's entitlement of ½ share over the suit land does not arise.

4. In reply to the application of the petitioner for temporary injunction it was submitted that the petitioner has got his name mutated in the revenue record over the suit land against which the respondent No. 1 preferred revision which was allowed and the mutation in favour of the petitioner was set aside and the matter was remanded back to Tehsildar for fresh adjudication. Since the petitioner was creating obstruction in the possession of respondents No. 1 and 4, they initiated proceedings under Section 250 of the Land Revenue Code. It was further objected to that the suit for declaration simplicitor has been filed without any pleading that the petitioner is in possession and a relief of permanent injunction has not been claimed, therefore, the order of temporary injunction cannot be passed in favour of the petitioner. Whereas respondent No. 3, father of the petitioner, has supported the claim of the petitioner.

5. The trial Court vide order dated 23rd June 2003 rejected the application for temporary injunction (Annexure P/12) with a finding that the instant suit for declaration of title was barred by Section 4(1) of Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as 'Act of 1988') as the petitioner has pleaded in the plaint that his father Malikram purchased the suit land in the name of his mother Paraga Bai and Sub-section 3(a) of Section 4 of the Act of 1988 is not applicable in the present case because Paraga Bai, wife of Malikram, is not a coparcener in a Hindu undivided family, that the suit was premature as the same has been filed during the lifetime of Paraga Bai for declaration of title and the proceedings under Section 250 of the Land Revenue Code were initiated for obtaining possession before the competent revenue Court by respondents

No. 1 and 4 and if any injunction order is passed against them, it will cause more inconvenience to the respondents. Learned trial Court further held that where a person in possession is dispossessed forcibly and illegally, he is entitled for protection of possession, on the contrary, where a person is in possession without any lawful title and if he is dispossessed by a process of law, the possession of such person cannot be protected, therefore, the question of irreparable injury to the petitioner does not arise.

6. Appeal preferred by the petitioner has also been dismissed vide order of Annexure P/13 with identical findings.

7. Learned counsel for the petitioner submits that the orders of both the Courts below are primarily based on misinterpretation of the Act of 1988. Learned Civil Judge has virtually decided the fate of the suit by holding the same not maintainable in view of Section 4(1) of the Act of 1988. Both the Courts below have disregarded this fact that the petitioner was in possession of the suit land and the Tehsildar vide order of Annexure P/14 without recording a finding as to when the petitioner dispossessed respondents No. 1 & 4 from the disputed land, has directed to hand over possession of the suit land to them by dispossessing the petitioner in utter disregard to provisions of Section 250 of the Land Revenue Code. The appeal preferred by the petitioner has been summarily rejected by the Sub Divisional Officer vide order dated 9.5.2005 on the ground that a title suit with respect to the disputed land is pending before the Civil Court.

8. On the other hand, Shri Prafull Bharat learned counsel appearing for the respondents submits that both the Courts below in exercise of their jurisdictions have rejected the application for temporary injunction on the sound principles of

law after recording a finding that the petitioner does not have a prima facie case, the balance of convenience is in favour of the respondents and if the injunction is passed the respondents shall suffer irreparable loss as they shall be restrained from recovering possession of the suit property through lawful means. It is argued that possession is to be delivered to the respondents on the basis of orders passed by a competent revenue Court under Section 250 of the Land Revenue Code. The above order has been passed after due notice to the petitioner and the appeal preferred by the petitioner has been summarily dismissed and in the aforesaid circumstances, in the garb of an order of temporary injunction, execution of the orders of revenue Courts cannot be stopped.

9. Placing reliance on the judgment of the Hon'ble Supreme Court in the matter of **Surya Dev Rai Vs. Ram Chander Rai and others** reported in **AIR 2003 S.C. 3044**, it is argued by learned counsel for the respondents that for issuance of writ of certiorari and for the purposes of exercise of supervisory jurisdiction it is to be established that : (i) that error committed by the Courts below is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. The Hon'ble Apex Court in the above matter held as under;

> "The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where judicial conscious of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of

the aforesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate Court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis."

10. I have heard learned counsel for the respective parties and perused the orders passed by both the Courts below whereby application for temporary injunction preferred by the petitioner has been rejected.

11. Learned trial Court has held that the petitioner does not have a prima facie case on the ground that the petitioner has pleaded in his suit that the land in question was purchased by his father (respondent No. 3) in favour of his mother Paraga Bia (since deceased, defendant No. 2) and thus, the suit is barred under Section 4(1) of the Act of 1988. The above finding of the trial Court which has been subsequently confirmed by the lower appellate Court, prima facie appears to be based on misinterpretation of the Act of 1988. For this, section 3 (2)(a) and section 4 of the Act of 1988 are being reproduced as under:

3. Prohibition of *benami* transactions. – (1) xxxxx xxxxx xxxxx xxxxx xxxxx xxxxx xxxxx xxxxx

(2) Nothing in sub-section (1) shall apply to –

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

4. Prohibition of the right to recover property held *benami*. – (1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply, -

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

12. The Hon'ble Supreme Court in the matter of **Nand Kishore Mehra Vs. Sushila Mehra** reported in **AIR 1995 SC 2145** while dealing with sections 3(2) and 4(1)(2) rejected the application of the defendant for rejection of the plaint and held thus:

> "Neither the filing of suit nor taking of a defence in respect of either the present or past benami transaction involving the purchase of property by a person in the name of his wife or unmarried daughter is prohibited under sub-sections (1) and (2) of Section 4 of the Act. But, it has to be made clear that when a suit is filed or defence is taken in respect of such benami transaction involving purchase of property by any person in the name of his wife or unmarried daughter, he cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in sub-section (2) of Section 3 that unless a contrary is proved that the purchase of property by the person in the name of his wife or his unmarried daughter, as the case may be, was for her benefit."

13. The Hon'ble Apex Court in the matter of **G.Mahalingappa Vs. G.M. Savitha** reported in **(2005) 6 SCC 441** while dealing with Section 3(2) and Section 4(2) of the Act of 1988 has held thus:

> "**24.** Section 3(2) makes it abundantly clear that if a property is purchased in the name of an unmarried daughter for her benefit, that would only be a presumption but the presumption can be

rebutted by the person who is alleging to be the real owner of the property by production of evidences or other materials before the court. In this case, the trial court as well as the appellate court concurrently found that although the suit property was purchased in the name of the respondent but the same was purchased for the interest of the appellant. We are therefore of the opinion that even if the presumption under Section 3(2) of the Act arose because of purchase of the suit property by the father (in this case the appellant) in the name of his daughter (in this case the respondent), that presumption got rebutted as the appellant had successfully succeeded by production of cogent evidence to prove that the suit property was purchased in the benami of the respondent for his own benefit."

14. In the present suit also the petitioner has claimed that the disputed property though recorded in the name of his mother Paraga Bai but the same was purchased by his father, respondent No. 3 Malikram and it was given to him in share and accordingly, the land was mutated in his name. However, revision preferred by the respondents was allowed by the Collector and the matter was remanded back to the Tehsildar but Tehsildar without issuing notice to the petitioner mutated the record in the name of respondents No. 1 & 4 and thereafter, the respondents on the strength of mutated revenue record applied under Section 250 of the Land Revenue Code and Tehsildar ordered handing over of possession of the suit land to the respondents after dispossessing the petitioner. Respondent No. 3 Malikram has also pleaded similarly.

15. Thus, in the light of the above judgments, finding of the trial Court that the suit was barred in view of Section 4(1) of the Act of 1988 is an error manifest and apparent on the face of the proceedings and the same is based on clear ignorance and utter disregard of the provisions of law.

16. The Courts below while deciding the application for temporary injunction have not gone into the factum of possession. The suit was filed on 4.1.2002 and the application for temporary injunction was filed by the petitioner on 26.10.2002, however, during pendency of this application Tehsildar vide order dated 31.5.2003 directed handing over of possession of the suit land to respondents No. 1 & 4 after dispossessing the petitioner. From subsequent documents filed by the petitioner it appears that possession of the suit land continued with the petitioner and the petitioner has sown crop in the current year also. Therefore, this Court is of the considered view that the order impugned which is based on clear ignorance of provisions of law would definitely occasion a grave injustice as the petitioner shall be deprived of the crops sown by him.

17. In the aforesaid circumstances, the petition is allowed. Orders passed by both the Courts below of Annexure P-12 dated 23.6.2003 and Annexure P-13 dated 9.5.2005 whereby the application for temporary injunction preferred by the petitioner has been rejected and the appeal preferred by him has also been dismissed, are set aside. It is directed that status-quo with respect to possession of the suit property as it was existing on the date when the order of Annexure P-12 dated 23.6.2003 was passed, shall be maintained by the parties, till disposal of the suit.

Sd/-
Dhirendra Mishra
Judge